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Supreme Court of the United States

OCTOBER TERM, 1952

No. 203

In the Matter

of

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

Debtor.

THE CITY OF NEW YORK,

Petitioner,

against

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

PETITIONER'S REPLY BRIEF

DENIS M. HURLEY,
Corporation Counsel of the City of New York,
Municipal Building,
New York, N. Y.

SEYMOUR B. QUEL,
HAROLD E. O'DONNELL,
PETER SCHEPS,
ANTHONY CURRERI,
of Counsel.

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PETITIONER'S REPLY BRIEF

(1)

In Point II of its brief, the Railroad reveals that it is subject to the confusion which results from the failure to distinguish clearly between (1) a tax lien on real property, (2) a tax lien on personal property, and (3) a tax unaccompanied by any lien and enforceable only as a debt due from the bankrupt. In our opinion, our main brief (Petitioner's Br., pp. 13-15) has dispelled that confusion and no purpose would be served by repeating what was there said. The conclusions we reached are reinforced by the analysis of Sections 67 and 64a contained in REMINGTON, *Bankruptcy*, 5th ed., Vol. 6, §§ 2825, 2833. Once the distinction between a tax claim which must be filed under

§ 57n, and a statutory lien for taxes which is protected by § 67 (b) is understood, it becomes clear that the position taken by the City in this proceeding is valid; i.e., that statutory tax liens may not be discharged by failure of the taxing authority to comply with a general order requiring the filing of claims.

(2)

Under Point III of its brief, the Railroad claims that the second question presented by the City in its petition for certiorari was not raised until that time, and therefore has been eliminated from consideration by this Court. The question referred to was whether the notice by publication to file claims was a reasonable notice to the City under § 77 (c) (8), in view of the fact that the Railroad knew the City's name, interest and whereabouts and could easily have notified it by mail to file its claim.

Contrary to the Railroad's assertion, this question was raised in the lower Courts. We pointed out to the District Court in our reply brief that the Railroad was seeking to bar our liens without ever having brought their existence to the attention of the Court. We had never been listed as creditors, whether disputed or not, as required by § 77 (c) (4).

As the decision of the District Court indicates (R. 91), we did advance the contention that the City would be deprived of its liens without due process if the Court were to hold that we were barred by our failure to file a claim because of the provisions of Order No. 32 (See also, R. 37-38, Par. 42). Since the majority of the Court of Appeals adopted the opinion of the District Court, the question was necessarily before the former and considered by it. Furthermore, the dissenting opinion of Judge FRANK placed great stress upon the failure to comply with the requirements of §§ 77 (c) (4) and 77 (c) (8) (R. 96-104). It is proper to assume, therefore, that the several judges who considered this matter passed upon the reasonableness of the notice which was provided for in Order No. 32.

In this connection the Railroad's brief (p. 24) refers to the affidavit of Meyer Scheps, counsel for the City, in an attempt to show that the City did not originally place its reliance upon a failure to receive a mailed notice, as an indication, we assume, that the question which we now seek to present to this Court was not presented below. This inference the Railroad captiously draws from a statement in Mr. Scheps' affidavit that "the City relied upon the Trustees' course of conduct" (R. 35). Obviously, part of the course of conduct upon which the City relied was the Trustees' failure to provide for the mailing to the City of a notice to file a claim. As the dissenting opinion of Judge FRANK points out, the statute expressly commanded the Court to give the City "reasonable notice" of the bar order, and as a creditor known to the debtor "that means notice by mail" (R. 100).

(3)

The remainder of Point III of the Railroad's brief (pp. 25-31) is devoted to an attempt to weaken the impact of the decision in *Mullane* v. *Central Hanover Trust Co.*, 339 U. S. 306 (1949), upon the proceeding at bar. All except one of the cases which the Railroad cites on the question of notice are cases decided before the *Mullane* decision. None of them passes upon the specific question decided in the *Mullane* case; i.e., that a notice by publication violates due process where the person sought to be reached by the notice and his whereabouts are known to the party required to give the notice. Those cases dealing with reorganization under § 77 and § 77B only support the proposition that the final order in the reorganization proceeding is binding on all interested parties. For example, while *Mohonk Realty Corporation* v. *Wise Shoe Stores*, 111 F. 2d 287 (C. C. A., 2d Cir., 1940), cited by respondent, held that a reorganization plan consummated under § 77B is binding even as against creditors who were never scheduled and who never knew of the proceedings, it did not hold that a creditor

whose name and whereabouts were known to the debtor, and who received no notice to file a claim except by publication, was so bound.

The one case which the respondent cites which came after the *Mullane* decision is *Standard Oil Co. v. New Jersey*, 341 U. S. 428 (1951) (Resp't's Br., p. 26). But there the statute prescribing notice by publication was upheld *because* the names and interests of the persons sought to be notified were unknown. Far from qualifying the doctrine announced in the *Mullane* case, the Court referred to that decision with approval and noted that the statute before it fell within one of the classes which, in the *Mullane* decision, it had held was a proper subject for notice by publication (341 U. S., at p. 434).

The lengths to which a debtor or its trustees in reorganization proceedings should go in order to determine the existence of lienors are dramatically illustrated in *Herbert V. Apartments Corp.* v. *Mortgage Guarantee Co.*, 98 F. 2d 662 (C. C. A., 3d Cir., 1938). There the debtor in Chapter X reorganization proceedings held property subject to the lien of a mortgage in which 212 participating certificate holders had an interest. The debtor, which did not know their names or addresses, was desirous of giving notice of the reorganization proceedings directly to the certificate holders. The District Court refused to make available to the debtor a list of the names and addresses of the lienors because of the opposition of the agent for 157 of the certificate holders, which claimed that it had a power of attorney to act directly for them. The Circuit Court, in reversing the order of the District Court, held that the certificate holders' rights would be substantially affected in the reorganization proceedings even though their claims were *in rem* and not *in personam*. It was held that the Court should exercise its discretion in the matter of notice in such a way as to carry out the Congressional intent which was to allow the debtor, its creditors, stockholders and claimants to establish a "concourse of interest which will avoid dismemberment of their respective rights." In directing that

the District Court should make the lists available to all creditors, stockholders and parties to the proceeding, the Court said, at page 667:

> "We think that Congress did not intend the provisions of 77B to operate in a kind of vacuum wherein information, ideas or proposed solutions relating to the difficulties of the reorganization may be kept from a substantial number of creditors."

(4)

The Railroad argues (Resp't's Br., p. 30) that the question of notice by publication or notice by mail becomes wholly immaterial because the City contends that it need not have filed a claim under any circumstances. If we are correct in our position that the Railroad was required by law to give the City notice more adequate than that afforded by publication, we fail to see how the Railroad's violation of the terms of the statute can be excused simply because the City might have taken the position that its assessment liens could in no way be affected by the reorganization proceedings. Furthermore, the Railroad assumes that the City would not have filed a claim even if it had received proper notice. This is not a valid assumption, since the City, following the dictates of ordinary prudence, undoubtedly would have filed a claim even though it might have contested the requirement to do so.

(5)

Finally, the Railroad attempts to excuse its failure to mail notice of Order No. 32 to the City by characterizing the City's assessment liens as "stale and invalid claims" (Resp't's Br., p. 31). This characterization is not in accord with the facts. The Railroad dealt with the City on a number of occasions during the reorganization proceedings and paid assessment liens similar in character and levied as part of the same proceedings as some of the liens here involved (R. 32-34). The Railroad asserts that these

payments were made only because they facilitated the payment of money due from the City in condemnation proceedings. But whatever the reason for the payments may have been, the fact that they were made shows that the City's liens were neither stale nor invalid. Indeed, if the Trustees had made payments on "stale and invalid" liens they would have been derelict in performing their duty.

Moreover, it should be noted that the last of the liens herein involved became a lien on January 25, 1930 (R. 26), less than six years prior to the inception of the reorganization proceeding. This is hardly a "stale" lien. As a matter of fact, one of the assessment liens similar to those here involved, which the Railroad paid while in reorganization, was entered December 31, 1909, thirty-two years before the date of its payment (R. 33). In any event, it should be pointed out that the so-called "staleness" of the City's liens is predicated solely upon the assertion that the City never made an attempt to enforce them. As a matter of law, no affirmative action is required of the City in order to preserve the vitality of its assessment liens. They are and remain liens until paid; they are a matter of record, and mere passage of time alone will not serve to destroy their validity.

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* Note the inconsistency of this attitude. "Staleness" implies original validity and unenforcibility by passage of time. "Invalidity" connotes illegality from inception. In order to raise the claim of "staleness", the Railroad has receded from its position that the liens were void *ab initio*. We reemphasize, nevertheless, the fact that the validity of the imposition of these liens is not before this Court.

CONCLUSION

The judgment of the Court of Appeals should be reversed, the order and decree of the District Court vacated, and the cause remanded for further proceedings not inconsistent with the declaration that the assessment liens of the City of New York, set forth in Exhibit A attached to the petition herein, are and continue to be valid and subsisting liens.

December 16, 1952.

Respectfully submitted,

DENIS M. HURLEY,
Corporation Counsel,
Counsel for Petitioner,
The City of New York.

SEYMOUR B. QUEL,
HARRY E. O'DONNELL,
MEYER SCHEPS,
ANTHONY CURRERI,
of Counsel.